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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

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9 OPAL HARGER, *et al.*

10 Plaintiffs,

11 v.

12 U.S. DEPARTMENT OF LABOR,  
13 and THE NATIONAL INSTITUTE  
14 OF OCCUPATIONAL SAFETY  
15 AND HEALTH,

16 Defendants.

NO. CV-06-5071-RHW

**ORDER GRANTING MOTION  
TO DISMISS, *INTER ALIA***

17 Before the Court are Defendant NIOSH's Motion to Dismiss (Ct. Rec. 226),  
18 two motions for joinder of additional Plaintiffs (Ct. Recs. 258 and 286), and the  
19 parties' Joint Motion to Stay (Ct. Rec. 283). For the reasons set forth below, the  
20 Court grants each motion.

**I. MOTION TO DISMISS**

21 This motion reiterates arguments Defendant NIOSH first advanced in 2007,  
22 but upon which the Court reserved ruling, stating: "The respective roles of DOL  
23 and NIOSH, a branch of the Department of Health and Human Services, in dose  
24 reconstruction and determination of eligibility for benefits under the EEOICPA is  
25 not absolutely clear to the Court at this time. Therefore, it deems dismissal of  
26 NIOSH premature and denies the Government's motion to dismiss it as a  
27 Defendant." Ct. Rec. 61. The motion to dismiss asserts that Plaintiff Johnson's  
28 claim has been finally denied and her lawsuit is now ready to move forward.

**ORDER GRANTING MOTION TO DISMISS, *INTER ALIA* \* 1**

1 Therefore, the motion seeks to dismiss NIOSH not only from Plaintiff Johnson's  
2 claim, but also from the claims of all Plaintiffs.

3 While this motion was pending, Defendants reopened Plaintiff Johnson's  
4 administrative claim, and the parties have asked the Court to stay the proceedings  
5 in her case. Notwithstanding this fact, the Court finds that the motion to dismiss  
6 raises legal issues common to all Plaintiffs, regardless of the facts or current  
7 postures of their particular claims. Accordingly, the Court finds the motion ripe for  
8 review, and the Court's ruling will apply to each Plaintiff's claims.

### 9 **A. Background and Administration of the EEOICPA**

10 In 2000, Congress passed the Energy Employees Occupational Illness  
11 Compensation Program Act of 2000 (EEOICPA or "Act"), 42 U.S.C. § 7384 *et*  
12 *seq.* The EEOICPA establishes a compensation program providing benefits to  
13 individuals with illnesses caused by exposure to radiation and other toxic  
14 substances in the course of their work related to the nuclear weapon production and  
15 testing programs of the U.S. Department of Energy (DOE) or its predecessor  
16 agencies. 42 U.S.C. § 7384. Section 7384s provides that "a covered employee, or  
17 survivor of that covered employee if the employee is deceased, shall receive  
18 compensation for the disability or death of that employee from that employee's  
19 occupational illness in the amount of \$ 150,000." 42 U.S.C. § 7384s(a)(1).

20 The Act provides that the President carry out the compensation program  
21 through "one or more Federal agencies or officials, as designated by the President."  
22 42 U.S.C. § 7384d(a). Executive Order 13179 of December 7, 2000, vested the  
23 Secretary of Labor with primary responsibility for administering the Act, but  
24 delegated to the Secretary of Health and Human Services the duty of promulgating  
25 regulations establishing guidelines and methods for determining the likelihood that  
26 claimants sustained cancer during the performance of their duties at the DOE. 65  
27 Fed. Reg. 77,487. The Secretary of Labor ultimately delegated his responsibilities  
28 to the Director of the Office of Workers' Compensation Programs (OWCP). 20

1 C.F.R. § 30.1.

2 The claims process begins when claimants submit certain information to the  
3 OWCP. 20 C.F.R. § 30.100. A claimant must meet three basic criteria: (1) he or  
4 she has been diagnosed with cancer; (2) he or she contracted cancer after beginning  
5 employment at a covered facility; and (3) the cancer was “at least as likely as not”  
6 related to employment at the covered facility. 20 C.F.R. § 30.210. If a claimant  
7 falls within a Special Exposure Cohort (SEC), this third criteria may be met  
8 automatically. If not, the OWCP must forward the claimant’s claim package to  
9 NIOSH for a dose reconstruction. 20 C.F.R. § 30.115.

10 The basic principle of dose reconstruction is to characterize the radiation  
11 exposure of the affected employee, and then translate that exposure into quantified  
12 doses to specific body organs or tissues. 42 C.F.R. § 82.2. The Act required the  
13 President to establish guidelines for making such determinations after technical  
14 review by the Advisory Board on Radiation and Worker Health, and to establish an  
15 independent review process to assess the methodology provided by those  
16 guidelines. 42 U.S.C. § 7384n. In addition, HHS’s regulations provide a procedure  
17 to update this methodology, including revisions recommended by NIOSH, the  
18 Advisory Board, independent scientific organizations, DOL, and public comment.  
19 42 C.F.R. § 81.12.

20 After determining a claimant’s eligibility, OWCP issues a recommended  
21 decision and forwards that decision to the Final Adjudication Branch (FAB), who  
22 will consider objections and conduct a hearing if requested before issuing a final  
23 decision. 20 C.F.R. § 30.300. The methodology utilized by NIOSH for dose  
24 reconstructions cannot be questioned at this stage and is binding on the FAB. 20  
25 C.F.R. § 30.318. The FAB may however hear objections to NIOSH’s *application*  
26 of the methodology, and refer the case back to NIOSH for further consideration. *Id.*  
27 A claimant can ask the FAB to reconsider a final decision, and the DOL can reopen  
28 a claim for issuance of a new final decision at any time. 20 C.F.R. §§ 30.319,

1 30.320.

2 **B. Defendant NIOSH's Motion to Dismiss**

3 Defendant NIOSH sets forth two basic arguments for dismissal: (1) lack of  
4 subject matter jurisdiction, under multiple theories; and (2) failure to state a claim  
5 upon which relief can be granted.

6 *Subject Matter Jurisdiction*

7 1. Defendant NIOSH's first argument, and the heart of its motion, is that this  
8 Court lacks subject matter to hear Plaintiffs' claims because NIOSH's dose  
9 reconstructions are not "final agency action" under the Administrative Procedure  
10 Act (APA), 5 U.S.C. § 704.

11 The cases set out two conditions for final agency action: "First, the action  
12 must mark the consummation of the agency's decisionmaking process – it must not  
13 be of a merely tentative or interlocutory nature. And second, the action must be one  
14 by which rights or obligations have been determined, or from which legal  
15 consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal  
16 citations and quotations omitted). "[C]ertain factors provide an indicia of finality,  
17 such as whether the action amounts to a definitive statement of the agency's  
18 position, whether the action has a direct and immediate effect on the day-to-day  
19 operations of the party seeking review, and whether immediate compliance with  
20 the terms is expected." *Indus. Customers of Northwest Utils. v. Bonneville Power*  
21 *Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (internal quotations and citations  
22 omitted).

23 The parties dispute whether NIOSH's dose reconstructions meet the two  
24 prongs of the *Bennett* test. Plaintiffs liken the dose reconstructions to the Secretary  
25 of the Interior's biological opinions that were at issue in *Bennett*, which in  
26 themselves allowed the agency to "take" endangered species. 520 U.S. at 178.  
27 Defendant argues that the dose reconstructions are subject to further review by  
28 both NIOSH and DOL, and thus that no legal consequences flow directly from the

1 dose reconstructions to claimants.

2       This complicated administrative scheme is similar in its basic framework to  
3 the scheme at issue in *Indus. Customers*, where the court held that a decision of the  
4 Bonneville Power Administration (BPA) did not constitute final agency action.  
5 There, the BPA was tasked with periodically proposing revisions to power rates,  
6 but rate increases became final only after approval by a separate agency – the  
7 Federal Energy Regulatory Commission (FERC). *Id.* at 642. The court held that,  
8 even though the BPA’s determination triggered economic consequences in the real  
9 world, it had no final consequences for purposes of judicial review because the  
10 process required additional steps (*i.e.*, approval by FERC) before the determination  
11 took legal effect. *Id.* at 645-47. This was true even though FERC was barred by  
12 statute from modifying the BPA’s proposed rates, but could only affirm or remand  
13 the rates. *Id.* at 644.

14       Here, NIOSH’s dose reconstructions do seem to constitute the  
15 consummation of NIOSH’s administrative process. Like the biological opinions at  
16 issue in *Bennett*, they are an agency’s end product, notwithstanding the fact that  
17 they can be later revised. However, just like the proposed rate increases in *Indus.*  
18 *Customers*, no legal consequences flow from the dose reconstructions themselves.  
19 They are undoubtedly important, probably the single most important determinant  
20 for the criteria specified in 20 C.F.R. § 30.210. But Plaintiffs are incorrect that a  
21 claimant’s right to compensation is automatic if a dose reconstruction “shows a  
22 radiation exposure at work of a 50% or more probability of causation.” Ct. Rec.  
23 236. Rather, OWCP and the FAB must determine whether a claimant has met *all*  
24 criteria set forth in 20 C.F.R. § 30.210. No claim for compensation can be granted  
25 or denied on the basis of a dose reconstruction alone; rather, that dose  
26 reconstruction must be applied and considered by another agency.

27       In sum, because NIOSH’s dose reconstructions meet the first *Bennett* prong  
28 but not the second, the Court finds the dose reconstructions are not final agency

1 action. Therefore, the Court grants the motion to dismiss on this basis.

2 2. Defendant's second argument is that even if the Court finds the dose  
3 reconstructions to be final agency action, the Court lacks subject matter jurisdiction  
4 because Plaintiffs have another adequate remedy. *See* 5 U.S.C. § 704 (providing  
5 for judicial review only where agency action is final *and* "there is no other  
6 adequate remedy in a court"). Defendant argues that Plaintiffs' adequate judicial  
7 remedy is review of the DOL's ultimate decision, which Plaintiffs are of course  
8 pursuing in this litigation. Plaintiffs respond that this remedy is inadequate because  
9 they cannot challenge NIOSH's methodology during the FAB's review, and  
10 because of other deficiencies in FAB's administrative process.

11 Plaintiffs' objection that they cannot challenge NIOSH's methodology goes  
12 to the heart of their desire to bring NIOSH into this lawsuit. Plaintiffs seek some  
13 ability to challenge NIOSH's methodology during the adjudication process, and to  
14 seek judicial review if the agency denies such a challenge. But it is clear from the  
15 statutory and regulatory scheme that challenges to NIOSH's methodology are  
16 reserved to the rulemaking process and subsequent proposed revisions, not the  
17 adjudication of individual claims. *See* 42 U.S.C. § 7384n(d)(2); 30 C.F.R. §  
18 30.318; 42 C.F.R. § 81.12. Plaintiffs do not challenge the promulgation of the rules  
19 that set forth NIOSH's methodology, but instead seek judicial review of the  
20 substance of those rules as applied to Plaintiffs' claims. However, the general  
21 principle is that an agency's rule cannot be challenged at application, except for a  
22 few narrow exceptions. *Raton Gas Transmission Co. v. F.E.R.C.*, 852 F.2d 612,  
23 615 (D.C. Cir. 1988). Plaintiffs do not contend, and it does not appear to the Court,  
24 that any of those exceptions apply here. Therefore, the Court must treat the  
25 underlying rule as valid. Even if the Court finds that NIOSH's methodology is  
26 flawed, the Court can offer Plaintiffs' no relief against that methodology itself. The  
27 Court's inquiry must be limited to whether the DOL (through the FAB) was  
28 arbitrary and capricious in relying on the allegedly flawed methodology. Thus, the

1 Court finds that Plaintiffs' first objection here fails.

2 Plaintiffs' second and third objections to the adequacy of its remedy against  
3 DOL alone are that they have no access to secret communications between NIOSH  
4 and DOL, and that Plaintiffs' objections cannot be fully elucidated in the DOL's  
5 records during adjudication. Both of these arguments seem to be objections to the  
6 process pursued by the FAB during claims adjudication. Plaintiffs assert no reason  
7 why these objections implicate NIOSH itself, or why NIOSH's absence from this  
8 lawsuit would somehow render the Court's review of the FAB's claims  
9 adjudications process inadequate.

10 Therefore, the Court grants the motion to dismiss on this basis as well.

11 3. Defendant's third and final argument regarding subject matter jurisdiction is  
12 that NIOSH's dose reconstructions are committed to agency discretion by law,  
13 citing 5 U.S.C. § 701(a)(2). Courts have recognized such commitment where "a  
14 court would have no meaningful standard against which to judge the agency's  
15 exercise of discretion," and/or where "the agency's action requires a complicated  
16 balancing of a number of factors which are peculiarly within the agency's  
17 expertise." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (internal  
18 quotations omitted).

19 Plaintiffs argue that NIOSH's dose reconstruction guidelines are not solely  
20 committed to its discretion because the Act itself requires that a separate agency,  
21 the Advisory Board on Radiation and Worker Health, assess NIOSH's  
22 methodology through an independent review process. 42 U.S.C. § 7384n(c). In  
23 response, Defendant distinguishes between the guidelines NIOSH must use to  
24 determine probability of causation and the estimate of radiation dose, arguing that  
25 the latter is committed to NIOSH's sole discretion.

26 The case law indicates that this exception to judicial review normally applies  
27 where the language of a statute allows for a permissive exercise of agency  
28 decisionmaking. *See Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993); *Cornejo-*



1 *Barreto v. Siefert*, 379 F.3d 1075, 1087-88 (9th Cir. 2004); *Gifford v. Small*  
2 *Business Admin.*, 626 F.2d 85, 86 (9th Cir. 1980). Otherwise, courts have applied  
3 this exception to judicial review where an agency was called upon to make a policy  
4 decision, weighing considerations uniquely within that agency's expertise. *See*,  
5 *e.g.*, *Concrete Tie of San Diego, Inc. v. Liberty Const., Inc.*, 107 F.3d 1368, 1372  
6 (9th Cir. 1997); *Nelson v. Andrus*, 591 F.2d 1265, 1266 (9th Cir. 1978).

7 Neither of those two circumstances exist here. First, in contrast to the  
8 permissive statutory language in the first set of cases, here the Act's language is  
9 expressly mandatory. *Compare* 15 U.S.C. § 637(b)(1)(A) (empowering the SBA to  
10 provide assistance "whenever it determines such action is necessary") *with* 42  
11 U.S.C. § 7384n(c) (providing that the designated agency "shall establish by  
12 regulation methods for arriving at reasonable estimates of the radiation doses  
13 received by an individual"). Second, the dose reconstruction process does not  
14 involve the kind of policy decision normally reserved to agency discretion. Rather,  
15 the dose reconstruction is a mechanical process that involves the application of  
16 factors specified by regulation, not a subjective weighing of competing interests.

17 Accordingly, the Court declines to grant the motion to dismiss on this basis.

18 *Failure to State a Claim Upon Which Relief May Be Granted*

19 Defendant asserts two different reasons for dismissal for failure to state a  
20 claim: (1) Plaintiffs' due process claims are not cognizable; and (2) only DOL, not  
21 NIOSH, can determine eligibility for the compensation Plaintiffs seek. The Court  
22 finds these arguments to be intertwined, relying on the same reasoning as  
23 Defendant's arguments discussed above.

24 Essentially, Defendant argues that the due process claims advanced in  
25 Plaintiffs' First Amended Complaint are merely complaints about the  
26 administrative procedure involved in the FAB's claims adjudication. As Defendant  
27 points out in its reply memo, Plaintiffs have not responded to this argument.  
28 Rather, Plaintiffs have articulated a number of criticisms of DOL's implementation



1 of the Act and the FAB's hearing procedures. *See* Plaintiff's Response, Ct. Rec.  
2 236, pp. 14-16.

3 The Court agrees with Defendant's arguments. Plaintiffs' criticisms may  
4 indeed be valid, but they do not relate to NIOSH's actions under the Act. As  
5 Defendant points out, the sole authority to provide an administrative review  
6 process for claims adjudication has been delegated to the DOL, who accomplishes  
7 this through the FAB. Any due process violations that occur before the FAB  
8 cannot be remedied by NIOSH, but only by the DOL. Accordingly, the Court  
9 grants the motion on this basis as well.

### 10 **C. Conclusion**

11 The Court finds that it lacks subject matter jurisdiction over NIOSH because  
12 NIOSH's dose reconstructions are not final agency action, and because Plaintiffs  
13 have another adequate judicial remedy. The Court also finds that the complaint  
14 fails to state a claim as to NIOSH upon which relief can be granted. However, the  
15 Court does not find that the dose reconstructions are committed to NIOSH's  
16 discretion by law.

17 Therefore, the Court grants the motion and dismisses NIOSH from all  
18 Plaintiffs' claims.

### 19 **II. MOTIONS FOR JOINDER**

20 Defendants have not opposed Plaintiffs' two motions for joinder. The Court  
21 finds that the putative Plaintiffs' claims are in similar procedural postures and  
22 present the same legal issues as the other Plaintiffs. Therefore, the policies  
23 underlying Fed. R. Civ. Pro. 20(a)(1) are served by joining the two Plaintiffs, and  
24 the Court grants the motions.

### 25 **III. MOTION TO STAY**

26 The parties assert that Defendant has reopened Plaintiff Johnson's  
27 administrative claim, and anticipate that she will receive compensation at the  
28 conclusion of this renewed administrative process. Therefore, the Court agrees that

1 a stay is appropriate, and grants this motion.

2 Accordingly, **IT IS HEREBY ORDERED:**

3 1. Defendants' Motion to Dismiss (Ct. Rec. 226) is **GRANTED**. Defendant  
4 NIOSH is dismissed, and the District Court Executive is directed to terminate  
5 NIOSH from this matter.

6 2. Plaintiffs' Motions for Joinder (Ct. Recs. 258 and 286) are **GRANTED**.

7 3. The parties' Motion to Stay (Ct. Rec. 283) and Motion to Expedite (Ct.  
8 Rec. 280) are **GRANTED**. All deadlines in the Court's scheduling order (Ct. Rec.  
9 278) are stayed.

10 4. On or before **June 30, 2010**, the parties shall file a report on the status of  
11 this matter.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
13 Order and to provide copies to counsel.

14 **DATED** this 25th day of January, 2010.

15  
16 *s/Robert H. Whaley*  
17 **ROBERT H. WHALEY**  
18 United States District Judge

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